

1 36. I will allow 37 in, the final report on pole
2 survey, but nothing else comes in. The rest of these
3 are going out on the basis of their essentially being
4 status report pleadings that were for purposes of
5 benefitting me, "me" being the Commission, in
6 connection with managing this case.

7 And I'm just concerned about it diffusing
8 the issues in this case to the point of going down
9 areas that are not going to help resolve the case at
10 all.

11 So I'll give you the last one.

12 MR. COOK: Your Honor, I believe you just
13 referred to 37, which we hadn't been talking about.
14 That's a separate --

15 JUDGE SIPPEL: Well, I meant to say 36.
16 I have got the tabs in front of me and I'm looking at
17 the wrong tab. It's to -- pardon me?

18 MR. COOK: It relates to the same point.

19 JUDGE SIPPEL: It's Gulf Power's final
20 report on pole survey, which is Tab 36?

21 MR. COOK: Right.

22 JUDGE SIPPEL: Yes.

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1 MR. COOK: Your Honor, I understand that
2 I would be free through cross examination of Gulf
3 Power's witness though to use the previously marked
4 documents to investigate any questions of credibility
5 in the conducting of the Osmose survey.

6 JUDGE SIPPEL: You could try, but let me
7 tell you I am not so much concerned about the issues,
8 the arguments that are being raised by Gulf Power, I
9 mean, although they are legitimate arguments. My
10 concern about this case being turned on the dime and
11 taking a wrong turn, that's going to take too much
12 time.

13 I don't think this is going to be worth
14 much.

15 MR. COOK: Trust me. This won't take very
16 long, but there is a key issue, and I understood you
17 may have just issued a different ruling than you did
18 a few moments ago because I thought you had agreed
19 with us that because it does contain very direct
20 factual information about the number of poles and the
21 type of pole analysis, first pass and second pass and
22 when that was done, that it would come in.

1 JUDGE SIPPEL: Well, all right. Let me
2 get Mr. Campbell or Mr. Langley to respond to that
3 before I change my mind again.

4 MR. CAMPBELL: That same information, Your
5 Honor, comes in in the form of deposition testimony
6 from David Tessieri and in the actual Osmose work
7 data, work papers, the source documents. All those
8 same points are there. They just want to reach onto
9 these for different reasons that we have already
10 pursued, already discussed, and that has been handled.

11 The problem that you have here is that it
12 does take us down a rabbit trail that's going to
13 detract from the real purpose of the proceeding. As
14 Mr. Langley pointed out, you have a completeness
15 issue. There were hearings that were associated with
16 these reports. Do those statements come in as well to
17 lend themselves to the reliability in the statements
18 made in the documents?

19 And no witness that takes the stand is
20 going to be able to do that because Mr. Langley made
21 the statement, not the witness. He made it in a
22 pleading to the Court. This is why this type of

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1 evidence does not come into the record.

2 The information they wanted in their
3 proffer is there. It's in the source documents, not
4 in the attorney's statements. So your ruling is
5 correct. If they want to try to use that for cross
6 examination, they can try if they can establish that
7 the witness has seen them, the witness had some
8 participation in filing the report. You know, they
9 can try that, but not for purposes of admissibility
10 into the record.

11 JUDGE SIPPEL: All right. I think Mr.
12 Campbell has the best deal.

13 I am going to just admit this as a matter
14 of discretion. I'm go take judicial notice of Number
15 36 and let it come in that way. It's an official
16 document and I'll take notice of it because it gives
17 the final report of the survey for whatever it's
18 worth. I mean, it gives the attorney's report on the
19 final report for whatever it's worth.

20 With respect to the other documents, the
21 same rule applies as for anything on cross
22 examination. If you think you can get a -- if you can

1 bring a witness around to confirm familiarity with it
2 in the manner that Mr. Campbell was saying, then you
3 know you might have a shot at using it, but I'm
4 certainly not encouraging it for the reasons I stated.
5 I think it's going to be a distraction and turn out to
6 be a waste of time.

7 Now, okay. I've said a lot. Let me make
8 a ruling on this. Tabs Nos. 29 through 36 are marked
9 for identification as Exhibits 29 through 36 of
10 Complainants, and they are received in evidence as
11 Complainants' 29 through 35.

12 MR. LANGLEY: Your Honor, I must have
13 misunderstood your ruling. I thought you said those
14 were --

15 JUDGE SIPPEL: Let me back up. Let me
16 back up. They rejected. Twenty-nine through 35 are
17 marked for identification as Complainants' exhibits,
18 but they are rejected in evidence.

19 (Whereupon, the documents
20 referred to were marked as
21 Complainants' Exhibit Nos. 29
22 through 35 for identification and

1 were rejected from evidence.)

2 JUDGE SIPPEL: Thirty-six is identified as
3 Complainants's Exhibit 36, and that is received in
4 evidence under judicial notice, not because it has any
5 particular -- I'm not accepting it as a proffered
6 relevant document, but it is in the record as an
7 exhibit. And that takes care of them.

8 (Whereupon, the document referred
9 to was marked as Complainants'
10 Exhibit No. 36 for identification
11 and was received in evidence.)

12 JUDGE SIPPEL: Thirty-seven is the next
13 one.

14 MR. COOK: Yes, Your Honor.

15 JUDGE SIPPEL: Is this going to be
16 objected to?

17 MR. LANGLEY: It is not.

18 MR. COOK: I don't believe so, Your Honor.
19 Thirty-seven, Your Honor actually directed Gulf Power
20 to go out and compile this and issued an order back in
21 I think it was September saying, "I want to have by
22 October 17th a proffer of full capacity evidence as to

1 three poles," and this is what they filed.

2 JUDGE SIPPEL: All right. And there's no
3 objection to this?

4 MR. LANGLEY: No objection.

5 JUDGE SIPPEL: Okay. Then the document,
6 and it has got attachments to it; the non-binding
7 proffer, which is in Tab 37 is now identified as
8 Complainants' Exhibit 37 and is received in evidence
9 as Complainants' Exhibit 37.

10 (Whereupon, the document referred
11 to was marked as Complainants'
12 Exhibit No. 37 for identification
13 and was received in evidence.)

14 JUDGE SIPPEL: And that completes the
15 first volume, correct?

16 MR. COOK: Yes.

17 JUDGE SIPPEL: Okay. Thank you very much.
18 Let me get the next one up.

19 Volume 2 of 3. Okay, Mr. Cook.

20 MR. COOK: Number 38 is an exhibit that
21 consists of maps related to work done by the pole
22 surveyor, Osmose, and what you have is a map that Gulf

1 Power produced to us pursuant to Your Honor's order.
2 I believe it was around December 9th of last year, and
3 then an 11 by 17 blow-up of each map that at least
4 allows you to read the street numbers, and so it is a
5 series of maps of poles in areas where, as we
6 understand from Gulf, Osmose did some of its pole
7 work.

8 JUDGE SIPPEL: Okay. Any objection?

9 MR. LANGLEY: No objection.

10 JUDGE SIPPEL: Tab 38 --

11 MR. COOK: Thirty-nine -- oh, 38, yes,
12 sir.

13 JUDGE SIPPEL: Tab 38, marked for
14 identification as Complainants' Exhibit 38, is
15 received in evidence as Complainants' Exhibit 38.

16 (Whereupon, the document referred
17 to was marked as Complainants'
18 Exhibit No. 38 for identification
19 and was received in evidence.)

20 JUDGE SIPPEL: Your next exhibit.

21 MR. COOK: And the next two are filings
22 that we made pursuant to the joint order submitted to

1 you in I believe it was early or mid-December, and
2 that is Complainants' identification of 50 utility
3 poles, Tab 39, and there is a small correction that we
4 filed shortly thereafter because one photograph, I
5 think, had an incorrect address and another one had
6 been left out.

7 So essentially what you have there is
8 Complainants' designation of 50 poles in 39 and 40.

9 JUDGE SIPPEL: Designation of 50 poles by
10 Complainants, right?

11 MR. COOK: Right.

12 JUDGE SIPPEL: Tabs 39 and 40 have been
13 identified, and they will be marked for identification
14 as Complainants' Exhibits 39 and 40 and received in
15 evidence as Complainants' Exhibit 39 and 40.

16 (Whereupon, the documents
17 referred to were marked as
18 Complainants' Exhibit Nos. 39 and
19 40 for identification and were
20 received in evidence.)

21 MR. COOK: And at this point, Your Honor,
22 I'm going to sit down and my colleague is going to

1 discuss the remaining exhibits.

2 JUDGE SIPPEL: Thank you, Mr. Cook. Thank
3 you.

4 Mr. Seiver.

5 MR. SEIVER: Thank you, Your Honor.

6 Carrying on, the rest of Volume 2 is
7 Exhibits 41 through 46. I don't believe there's an
8 objection until we get to 46. So I was going to cover
9 41 through 45 as a group, Your Honor.

10 JUDGE SIPPEL: Forty-one through 45 is
11 fine.

12 MR. SEIVER: Tab 41 is the curriculum
13 vitae of Patricia Kravtin, our economics expert for
14 Complainants.

15 Tab 42 is the list of documents that she
16 reviewed.

17 Tab 43 is her calculation under the FCC's
18 cable formula of the maximum cable pole attachment
19 rate using the data from Gulf Power's FERC Form 1s,
20 which are actually Exhibit or Tab 45. So 43 and 45
21 work together as the source document, and 45 are the
22 numbers which are used in the formula in Tab 43, which

1 calculates through 2005, 2000 through 2005, the
2 maximum cable rate, which is under the FCC formula.

3 JUDGE SIPPEL: And what is 44?

4 MR. SEIVER: Forty-four are the
5 replacement cost calculations which may be outdated
6 right now, but those are the ones that were used at
7 her deposition, and that's why we chose them as the
8 ones offered by Gulf Power at the deposition and which
9 have been already marked, I believe, elsewhere in that
10 format and in a later exhibit as another format of, I
11 believe, an updated replacement cost calculation where
12 the Gulf Power witnesses have tried to use the FCC
13 formula and with playing with different inputs changed
14 the output to come up with a maximum rate more to
15 their liking.

16 JUDGE SIPPEL: Okay. Any objection to any
17 of those documents, 41 through 45?

18 MR. LANGLEY: No objection.

19 JUDGE SIPPEL: Then the tabbed documents
20 41 through 45 are marked for exhibits as Complainants'
21 Exhibits 41 through 45 and are received in evidence as
22 Complainants' Exhibits 41 through 45.

1 (Whereupon, the documents
2 referred to were marked as
3 Complainants' Exhibit Nos. 41
4 through 45 for identification and
5 were received in evidence.)

6 JUDGE SIPPEL: That leaves just 46 for
7 this volume.

8 MR. SEIVER: Forty-six, Your Honor, is
9 Complainants' complaint in this proceeding, which is
10 a pleading and which was filed with a number of
11 exhibits and a number of attachments, all of which are
12 similar to Mr. Dunn's affidavit, even though they were
13 filed in this proceeding, contain an explanation of
14 Complainants' claims and have a number of attachments
15 which put the contracts and relationships in
16 perspective, and our belief was then if Mr. Dunn's
17 affidavits were going to come in as prior pleadings
18 for whatever they are worth, then the complaint, which
19 was also something that was used and relied upon by
20 the witnesses in this case, that the complaint would
21 come in as an exhibit as well.

22 JUDGE SIPPEL: You're objecting?

1 MR. LANGLEY: Yes, we are objecting.
2 There's a couple of reasons for that. The first, like
3 our objections to some of these interim status
4 reports, this is a statement by an attorney. It's a
5 pleading. It's inadmissible hearsay. It is also
6 definitely an advocacy piece, and Mr. Cook before
7 lunch had objected to something that we had offered.
8 I believe it was the APPA workbook saying advocacy
9 pieces should not be admitted into evidence, and if
10 that is the case, then the Complainants' own complaint
11 in this case certainly fits that category.

12 Unlike though the affidavit of Mike Dunn,
13 there is not a witness or there does not appear to be
14 a witness who will be coming to trial to verify or
15 testify regarding the allegations in the complaint.
16 Mike Dunn will be on the witness stand and can be
17 cross examined, already has been cross examined on the
18 contents of his affidavit. So there are some stark
19 differences between the Mike Dunn affidavit and the
20 complaint with attachments that they're seeking to
21 offer as Exhibit 46.

22 So for those reasons, we object.

1 JUDGE SIPPEL: Mr. Seiver.

2 MR. SEIVER: Well, I wasn't sure that the
3 complaint was advocacy. I mean, it says that -- I
4 thought it was very factual about what the agreement
5 said and what had happened, and you know, obviously
6 the advocacy that we asked for is the reason we're
7 here today, is that the rate that was being charged we
8 thought was unlawful, and we asked to put the contract
9 rate in.

10 But it had all of the background
11 materials, correspondence and documents and exhibits,
12 all of which, you know, or some of which duplicate the
13 exhibits that Mr. Dunn had to his affidavit because we
14 didn't just get Mr. Dunn's affidavit. We got Mr.
15 Dunn's affidavit and a volume of I don't know if
16 that's 1,000 pages of exhibits.

17 So my understanding was you're right. I
18 don't have a witness that will come up and say this is
19 true and accurate, these copies, but I'm not going to
20 take the time -- maybe I shouldn't telegraph -- of
21 taking Mr. Dunn through every one of the attachments
22 to his affidavit to authenticate it. I think it's a

1 waste.

2 But if it's in the record, I want to have
3 our version in the record. His affidavit was in
4 response to our complaint.

5 JUDGE SIPPEL: Same argument?

6 MR. LANGLEY: Well, the complaint is an
7 attorney's version of the facts, and again, the
8 attorneys are not going to be testifying.

9 JUDGE SIPPEL: I'm going to sustain the
10 objection. I mean, it's a classic. A complaint is a
11 classic piece of advocacy drawn with as much art for
12 the purpose of persuasion as it is for any other
13 purpose. So it definitely has adjudicative --
14 judicial reliability. Let me put it that way.
15 Adjudicative usually involves a witness testimonial.
16 It is not prepared for testimonial purposes, and it's
17 not use for testimonial purposes.

18 So I'm going to sustain the objection as
19 to Tab No. 46. Tab No. 46 is identified, however, as
20 Complainants' proffered Exhibit No. 46, but it is
21 rejected.

22 (Whereupon, the document referred

1 to was marked as Complainants'
2 Exhibit No. 46 for identification
3 and was rejected from evidence.)

4 JUDGE SIPPEL: That takes care of the
5 second volume.

6 MR. SEIVER: Yes, Your Honor. We'll go on
7 to Volume 3.

8 JUDGE SIPPEL: Volume 3, Mr. Seiver.

9 MR. SEIVER: The first exhibit is not
10 objected to, which is the Alabama Power decision from
11 the Eleventh Circuit. We had earlier marked and
12 received that as part of Gulf Power's presentation.

13 JUDGE SIPPEL: All right. Do you think
14 there's going to be a greater number of documents that
15 we could get in without any objection or are you
16 anticipating objections?

17 MR. SEIVER: Well, just to keep it in
18 order, Your Honor, the next group are going to be, I
19 believe, objected to all the way up 48 to 73. So I
20 was going to deal with that next group together.

21 JUDGE SIPPEL: All right. You've put me
22 on notice. Thank you.

1 Okay. So we are going to Tab 47, which is
2 marked for identification, as the Alabama Power case
3 from the Eleventh Circuit. Is there any objection?

4 MR. LANGLEY: No objection.

5 JUDGE SIPPEL: All right. It is received
6 in evidence at this time as Complainants' Exhibit No.
7 47.

8 (Whereupon, the document referred
9 to was marked as Complainants'
10 Exhibit No. 47 for identification
11 and was received in evidence.)

12 JUDGE SIPPEL: That moves us on to did you
13 say 48 to 73?

14 MR. SEIVER: Yes, Your Honor. These have
15 been objected to, as I understand it, generally as
16 being pleadings. The first two that I would like to
17 have considered separately though because they are
18 related to Exhibit 47 both in our case and the Alabama
19 Power case, the version that was marked in Gulf
20 Power's Exhibits, are 48 and 48(a), and the reason is,
21 Your Honor, these are the underlying decisions by the
22 Bureau, and then on review by the Commission, in the

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1 Alabama Power Company proceeding, which resulted in
2 the Eleventh Circuit case.

3 So for a complete record of what the
4 Bureau and the Commission did, which was affirm in
5 Alabama Power v. FCC in Tab 47, we think 48 and 48(a)
6 are necessary components.

7 JUDGE SIPPEL: Well, I see 48 is the
8 Commission decision.

9 MR. SEIVER: I'm sorry. I had it
10 backwards. Yes, 48 is the Commission decision, and
11 48(a) is the Bureau's decision.

12 I'm sorry. I have to take that back. I
13 misspoke. I misspoke. Forty-eight is the Alabama
14 decision by the Commission that we are asking to have
15 come in as part of Exhibit -- as related to Exhibit
16 47. I misspoke, Your Honor. Forty-eight (a) is the
17 Gulf Power decision that was subject to
18 reconsideration in the hearing designation order in
19 this case.

20 JUDGE SIPPEL: Forty-eight (a) is the
21 memory (phonetic) and opinion order by the Chief of
22 the Enforcement Bureau.

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1 MR. SEIVER: In the Gulf Power matter that
2 was based on Alabama Power's decision and then
3 resulted in petition for rehearing, the descriptions
4 of evidence and then the hearing designation order.

5 JUDGE SIPPEL: Okay, and take me into 48
6 again. What is 48?

7 MR. SEIVER: Forty-eight is the decision
8 that was affirmed by the Eleventh Circuit that is Tab
9 47, and when the Commission was affirmed, there were
10 many statements in the Eleventh Circuit decision about
11 what the FCC did, and what the FCC did in the May 2001
12 order are directly relevant to issues that are being
13 addressed by all the witnesses.

14 JUDGE SIPPEL: All right. Now, is there
15 objection to this Mr. Campbell?

16 MR. CAMPBELL: There is. I mean, I'll
17 start with the hearsay objection, but I would also
18 lodge the relevance objection because while they may
19 be relevant to the legal development of this case,
20 they may be argued in the briefs. They may be part of
21 the findings of fact and conclusions of law. I don't
22 know how they're relevant to the factual issues to be

1 resolved in this case.

2 But first and foremost, they are hearsay,
3 and I think the objection has sort of been answered
4 when Mr. Seiver described it and said one of them at
5 least is part of the record in this case already. It
6 is part of the legal record. It is part of the
7 pleading development that got us to a hearing. It is
8 not disputed facts that we can challenge on the stand
9 here.

10 I doubt that anyone from the Bureau or
11 anyone from the Commission wants us to put them on the
12 stand and question them about statements that are made
13 in the context of a disputed decision that went up on
14 appeal and came back. That's not the stuff of
15 evidence in a hearing. It's legal argument. It's
16 advocacy.

17 MR. SEIVER: Your Honor, I just wanted to
18 make sure. There was a misunderstanding. Tab 48 is
19 the Commission's decision which was affirmed. Tab
20 48(a) was a decision in this case. So what Mr.
21 Campbell is talking about, the pleadings in this
22 particular proceeding, that is addressed to 48(a).

1 Exhibit 48 was not a pleading in this proceeding. It
2 was the decision which does have factual issues in it,
3 especially on page 21, that talks about replacement
4 costs and other issues which are factual issues that
5 are in this case that we will ask and we do think are
6 relevant with respect to what is a proper evaluation
7 method.

8 JUDGE SIPPEL: All right. Well, let me
9 frame this in a way that makes relevance to me, and
10 that is both parties have offered and have been
11 received into evidence as exhibits the Eleventh
12 Circuit's opinion, judicial decision.

13 Forty-eight, as I see it, is the
14 administrative decision from which the appeal was
15 taken to the Eleventh's Circuit.

16 MR. COOK: That's exactly right. The full
17 Commission.

18 MR. CAMPBELL: The whole record attached
19 to it that has a lot of evidence that was considered,
20 that wasn't considered, and the Eleventh Circuit test,
21 you know, does define this proceeding. The witnesses
22 in this proceeding considered the language of the

1 Eleventh Circuit case, which is the only reason we
2 even considered letting that case into evidence, is
3 because their expert looked at it and attempted to
4 apply it.

5 He didn't look back, as far as I know from
6 his deposition testimony at the underlying decisions.
7 Our witnesses didn't look back at the underlying
8 decisions for purposes of testifying in this case.
9 You know, and that's the whole problem. The test is
10 this is the Eleventh Circuit's test. How do we apply
11 that test?

12 Nobody wanted to go back and reopen the
13 entire record from those other proceedings and open up
14 all of that to cross examination. This is another one
15 of those rabbit trails.

16 We've got the Eleventh Circuit's test.
17 Are we going to deconstruct that and go all the way
18 back to square one? I don't think we're supposed to
19 do that in this proceeding. We're supposed to take
20 that test and move forward from that test and see how
21 it is applied. That's what we have attempted to do,
22 but now we're going to have to go back and, you know,

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1 look at this and cross examine their witnesses on
2 items that were in this record that maybe weren't
3 considered by their witnesses that should have been
4 considered.

5 We're adding days to the trial of this
6 proceeding is what's going to happen.

7 MR. SEIVER: Well, I don't think we're
8 adding anything into the record beyond what the
9 Commission held in the Alabama Power case at the
10 Commission level, which was affirmed and is directly -
11 - if the Eleventh's Circuit case is relevant, then
12 this case is relevant for where it was affirmed.

13 And as far as dealing with what else was
14 looked at by our experts, Ms. Kravtin did say she
15 consulted this opinion.

16 JUDGE SIPPEL: I think I've heard enough
17 on this. I think that there has been enough weight by
18 both sides on the Eleventh Circuit's opinion. I think
19 for purposes of record clarification, if nothing else,
20 I'm inclined to accept this as evidence.

21 But, again, I'm going to do this on the
22 basis that I did the other contested item. I'm going

1 to receive this. I'm going to take judicial notice of
2 it. I think it's the agency that we're in right now.
3 I think that the Commission's views insofar as they
4 were acknowledged, rejected, accepted by the Eleventh
5 Circuit does have enough significance in this case to
6 allow this to come in.

7 That does not mean that the record is
8 going to be gone into. Obviously the record is not
9 going to be gone into. I mean the record behind the
10 proceeding that got it up to the Commission. That's
11 not going to happen.

12 And the same logic would apply. I mean
13 obviously the Court of Appeals considered not only the
14 Commission's opinion but probably also considered the
15 record, and we're not going to go into that record
16 either. So we're not going into any of these records.

17 But under principles of discretion of the
18 presiding judge and principles of judicial notice, I'm
19 going to receive the tabbed document 48 identified as
20 Exhibit 48 and receive in evidence as Complainants'
21 Exhibit 48 at this time.

22 However, 48(a) is going to be rejected on

1 the basis of it being -- it's an extraneous document.

2 At this point it's an extraneous document.

3 MR. SEIVER: Very well, Your Honor.

4 JUDGE SIPPEL: So Tab 48(a) is identified
5 as the Bureau's Memorandum of Opinion and Order, dated
6 May 13th, and that is marked for identification as
7 Complainants' Exhibit 48(a) and is rejected.

8 (Whereupon, the documents
9 referred to were marked as
10 Complainants' Exhibit Nos. 48 and
11 48(a) for identification and No.
12 4 was received in evidence and
13 48(a) was rejected from
14 evidence.)

15 JUDGE SIPPEL: The next item of business,
16 please.

17 MR. SEIVER: Going in order, Your Honor,
18 so that we don't belabor it, 49 is one of Gulf Power's
19 petitions, which is in the record of this proceeding.

20 Exhibit 50 is their description of
21 evidence.

22 And 51 is the hearing designation order.